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IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

REVEREND PAUL SCHENCK and DWIGHT SAUNDERS,
Petitioners,

v.

PRO-CHOICE NETWORK OF WESTERN NEW YORK, ET AL.,
Respondents.

On Writ of Certiorari To The
United States Court of Appeals
For The Second Circuit

AMICUS BRIEF OF LIBERTY COUNSEL IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS[1]

Liberty Counsel is a non-profit civil liberties education and legal defense organization whose purpose is to promote respect for the worth and dignity of all human life, including the life of the unborn child from the moment of conception. Liberty Counsel's activities include educating the public regarding civil liberties and the interaction between law and individual freedoms -- especially as related to use of traditional public fora for discussion of controversies impacting society. As part of advancing Liberty Counsel's purpose, education is provided through interaction with attorneys and members of the academic community, publication of articles and journals in law reviews, providing legal counsel where appropriate, and filing *amicus curiae* briefs on a variety of issues.

Liberty Counsel files this brief in support of the Petitioners to assist this Court in rendering a reasoned decision regarding the *Madsen* test. Attorney Mathew D. Staver was lead counsel in the *Madsen* case and having argued that case before this Court herein attempts to lend his assistance in the proper application of *Madsen* to the facts within the record.

SUMMARY OF ARGUMENT

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), this Court created a new test to distinguish between injunctions and ordinances. Under the new *Madsen* test, this Court determined that a content-neutral injunction must "burden no more speech than necessary to serve a

[1] This brief is filed with permission of all the parties. The letters granting consent of the parties are attached hereto with the filing of this brief.

significant government interest." *Id.* at 2525. *Madsen* created a new four-part test to analyze speech-restrictive injunctions. The Second Circuit's en banc decision fails to satisfy the four-part test created by the *Madsen* Court.

Even assuming, *arguendo*, the court correctly followed the new *Madsen* test in creating the speech-restrictive injunction, under the *Madsen* test an injunction which burdens more speech than necessary is unconstitutional. In *Madsen*, this Court explained that the phrase "burden no more speech than necessary to serve a significant government interest" was equivalent to the "precision of regulation" standard utilized in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910-11 (1982), and the *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183 (1968), standard which requires an injunction be "couched in the narrowest terms that will accomplish the pin-pointed objective." *Madsen*, 114 S. Ct. at 2526. The speech-restrictive 15-foot floating zones and the "cease and desist" provision both fail the "precision of regulation" and "pin-pointed objective" standards reaffirmed by *Madsen*.

The *Madsen* test applies only to injunctions which are neither prior restraints nor content-based restrictions. Petitioners assert that the challenged provisions are both content and/or viewpoint-based and act as a prior restraint on free speech rights. If this Court determines the challenged provisions are content or viewpoint-based, the *Madsen* test is inapplicable, but the provisions are then subject to the "most exacting scrutiny." *Boos v. Barry*, 485 U.S. 312, 321 (1988). If this Court determines the challenged provisions are content or viewpoint-based, then those provisions also act as a prior restraint on free speech in traditional public fora. The injunction in *Carroll* was content-neutral, but was analyzed as a prior restraint. *Carroll*, 393 U.S. at 181. Therefore, under

any appropriately applied analysis, the challenged provisions must fail because they either "burden more speech than necessary" or they fail to meet strict scrutiny.

ARGUMENT

I.
THE SPEECH-RESTRICTIVE INJUNCTION IS UNCONSTITUTIONAL BECAUSE IT FAILS THE *MADSEN* TEST.

In *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516 (1994), this Court created a new test to distinguish between injunctions and ordinances. In creating this new standard, this Court held that "when evaluating a content-neutral injunction, we think that our standard time, place, and manner analysis is not sufficiently rigorous. We must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Id.* at 2525. As stated by this Court, the *Madsen* test applies only to injunctions which are neither prior restraints nor content-based restrictions. Requiring that regulations on free speech be "narrow and precise", this Court noted:

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. . . . [I]n other words, the order must be tailored as precisely as possible to the exact needs of the case.

Id. at 2526 (quoting *Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 183-84 (1968)).

This Court held in *Madsen* that speech-restrictive injunctions warrant more rigorous scrutiny because unlike legislative enactments they are ready tools for censorship. *Madsen*, 114 S. Ct. at 2524. Noting that injunctions mostly target specific persons or groups, are issued by a single judge and often carry stiffer penalties for violation of the terms, this Court held that such "[i]njunctions . . . carry greater risks of censorship and discriminatory application than do generally applicable ordinances." *Id.*; *cf. United Mine Workers of America v. Bagwell*, 114 S. Ct. 2552, 2563 (1994) ("[w]here a single judge, rather than a legislature, declares a particular sanction . . . such deference is less appropriate") (citing *Madsen*, 114 S. Ct. at 2516).

Madsen began its inquiry into the new test by stating that under general equity principles, injunctive relief affecting speech is permissible only upon a showing that: (1) the defendant has violated, or imminently will violate, some provision of statutory or common law;[2] (2) there is a cognizable danger of recurrent violation;[3] (3) a non-speech-restrictive injunction preventing the repeated illegal conduct has proven ineffective to protect the significant government interests because the defendant has repeatedly violated the injunction;[4] and (4) a subsequent speech-restrictive injunction may not burden more speech than necessary to serve a significant government interest.[5]

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[2] *Madsen*, 114 S. Ct. at 2524 n.3 (quoting *United States v. W. T. Grant Company*, 345 U.S. 629, 633 (1953)).

[3] *Id.*

[4] *Id.* at 2526-27.

[5] *Id.* at 2525-26; *see* Mathew D. Staver, *Injunctive Relief and the Madsen Test*, 14:2 ST. LOUIS U.PUB.L.REV. 456-494 (1995).

The first two prongs of the above test are applicable to any injunction because injunctive relief is an equitable remedy.[6] Thus, prongs one and two must be met before the entry of any injunction. After prongs one and two are met, a court must attempt to restore law and order by a non-speech-restrictive injunction, and only after that injunction proves to be ineffective may a subsequent speech-restrictive injunction be issued. Yet, even the speech-restrictive injunction may not burden more speech than necessary to serve a significant government interest. *See id.* at 2525-26.

The interest identified in *Madsen* was maintaining physical access to the clinic. Because this Court concluded that the first (the non-speech-restrictive) injunction was inadequate to protect access, and concluded that the named defendants repeatedly violated the first injunction, this Court was willing to uphold certain speech-restrictive portions of the second (speech-restrictive) injunction. Consequently, the second injunction, known in the *Madsen* case as the amended permanent injunction, was literally four steps removed from illegal activity.[7] In this case, the Second Circuit's en banc decision fails to satisfy the four-part test created by the *Madsen* Court.[8]

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[6] *Madsen*, 114 S. Ct. at 2524 n.3.

[7] *Madsen* cited *National Society of Professional Engrs. v. United States*, 435 U.S. 679, 697-98 (1978), for the proposition that an injunction may restrict what would normally be protected expressive activities when in the context of that restriction the violator is known to have repeatedly engaged in illegal conduct. *Madsen*, 114 S. Ct. at 2527.

[8] The Second Circuit en banc in *Pro-Choice Network of Western New York v. Schenck*, 67 F.3d 377 (2d Cir. 1995) (en banc), though not articulating *Madsen* as a four-part test, analyzed the injunction utilizing this format and found the 15-foot buffer zone and "cease and desist" provisions

A. There Was No Violation Or Threatened Violation Of Statutory Or Common Law.

As this Court instructed in *Madsen*, before instituting any injunction the court must first determine that the person or entity being enjoined has violated or imminently will violate some statutory or common law. *Madsen*, 114 S. Ct. at 2524 n.3. In this case, the District Court granted the TRO and the preliminary injunction prior to the development of the *Madsen* test. *Pro-Choice Network of Western New York v. Project Rescue Western New York*, 799 F. Supp. 1417 (W.D.N.Y. 1992). Following the reasoning in *Madsen*, the initial question is what statutory or common law was threatened which might warrant an injunction.

It is undisputed that Petitioners agreed to a voluntary injunction prohibiting "rescues" or "blockades" of the clinics. "Prior to the preliminary injunction hearing, defendants stipulated that the physical 'blockade' type of 'rescue' demonstration may be enjoined." *Pro-Choice Network*, 799 F. Supp. at 1424 n.5. Because all the parties agreed that no "blockades" of a clinic would ever occur, the government's interest in protecting access and assuring that the right to abortion was not infringed was satisfied. No possible violation of any "statutory or common law" could occur. In fact, the record reveals that the District Court specifically found that "there have been no physical 'blockades' since the Court issued the TRO." *Id.* at 1424 n.5. Although the TRO might have been warranted to protect access on September 28, 1990, following the teaching of *Madsen*, the preliminary injunction provisions challenged herein were not needed for two reasons: (1) there was no cognizable danger of recurrent

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to be constitutional under the heightened scrutiny demanded by *Madsen*. *Pro-Choice Network*, 67 F.3d at 395.

violations; and (2) the TRO and preliminary injunction *began* with speech-restrictive provisions without first determining whether less speech-restrictive provisions could protect access to the clinics. The true error in this case is the use of a federal court's judicial power to silence speech which some might find "stressful."

In misinterpreting the *Madsen* test and ignoring the clear record, the Second Circuit en banc decision cited what it believed were two techniques used by pro-life demonstrators to prevent individuals from entering or exiting abortion clinics. First, it found that the demonstrator's activities amounted to a "constructive blockade" because the picketing outside the clinics caused persons to feel "stress" while entering and exiting the facilities. *Pro-Choice Network*, 67 F.3d at 396. In the mind of the en banc court, the purpose of these "constructive blockades" was to intimidate individuals from attempting to utilize the abortion facility. *Id.* The second technique which the en banc court addressed was what it called "sidewalk counselling." In this technique, the pro-life demonstrators approached patients entering the clinic and offered them pro-life literature in an attempt to speak to them about the consequences of having an abortion. This, the court found, was also too intimidating to be permitted. In making their conclusions, both the District Court and the Second Circuit en banc found that the stress caused by pro-life activities sometimes caused women to forego their right to an abortion. The en banc panel concluded: "The timid have a right to go about their business, and it is no embarrassment for federal court to say so." *Id.*

Although protecting the "timid" might be a commendable avocation of some, asserting that the federal judiciary has the duty to protect us from speech which might upset us is contrary to this Court's long precedent. Quite to the contrary,

the First Amendment protects such speech -- even speech which some find offensive. "[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection." *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988) (quoting *FCC v. Pacifica Foundation*, 438 U.S. 726, 745 (1978)). "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Stress induced by speech or other listener reaction caused by speech-related activity is not a legitimate basis for regulating activities protected by the First Amendment. *See Forsyth County v. The Nationalist Movement*, 112 S. Ct. 2395, 2403 (1992); *Boos v. Barry*, 485 U.S. 312, 321 (1988). The excuse that someone has caused another person stress has never been used as proof that an individual has violated statutory or common law.

Even if actions amount to coercive activity, no statutory or common law is violated. If the First Amendment means anything, it means "free trade and the opportunity to persuade, not merely to describe facts." *Thomas v. Collins*, 323 U.S. 516, 537 (1945). The en banc decision held that speech activity which is coercive is not constitutionally protected. *Pro-Choice Network*, 67 F.3d at 395. However, as this Court stated in *Organization for a Better Austin v. Keefe*:

> The claim that expressions [are] intended to exercise a coercive impact . . . does not remove them from the reach of the First Amendment. Petitioners plainly intended to influence respondent's conduct by their activities; this is not fundamentally different from the function of a newspaper.

402 U.S. 415, 419 (1971) (citations omitted). This Court took an even stronger stand in *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 910-11 (1982), declaring: "Speech does not lose its protective character, however, simply because it may embarrass others or coerce them into action." In reality, once the right of access to the clinic is guaranteed, there is no valid basis to institute a speech-restrictive injunction.

The fact that a demonstration causes stress in no way violates statutory or common law. Thus, there was no violation or threatened violation of statutory or common law. Therefore, the speech-restrictive provisions are unjustified.

B. There Was No Cognizable Threat Of Continued Violation Of The Law.

The second element needed to justify the institution of an injunction is that there is a cognizable threat of continued violation of the law. *Madsen*, 114 S. Ct. at 2524 n.3. The only conceivable, cognizable threat of a legal violation is the blockading of access to the clinics. By the parties stipulation, the District Court instituted an injunction against physical blockades. At the time the preliminary injunction was entered, the pro-life picketers had never blocked or attempted to blockade any clinic since the entry of the TRO. Any threatened violation beyond this is simply a fallacious justification for the speech-restrictive injunction.

C. A Non-Speech-Restrictive Injunction Designed To Prevent Violation Of The Law Was Not Attempted Prior To Entering The Speech-Restrictive Injunction.

Before issuing a speech-restrictive injunction, a court must establish the insufficiency of a non-speech-restrictive

injunction. In *Madsen*, this Court found that a speech-restrictive injunction was necessary because a non-speech-restrictive injunction had been repeatedly violated. *Madsen*, 114 S. Ct. at 2526-27. Like *Madsen*, in this case the significant government interest is to protect access to the clinics. The *Madsen* Court held that the "state court seems to have had few other options to protect access given the narrow confines around the clinic."[9] This Court assumed that the first injunction failed to protect access to the clinic and thus allowed more radical measures. The Court gave deference to the state court's familiarity with the factual background and concluded:

> We also bear in mind that the fact that the state court originally entered a much narrower injunction, providing no buffer zone, and that this order did not succeed in protecting access to the clinic. The failure of the first order to accomplish its purpose may be taken into consideration in evaluating the constitutionality of the broader order.[10]

In *Madsen*, this Court clearly stated that it would uphold the speech-restrictive injunction only because the first injunction did not effectively protect access to the clinic. In this case, the District Court did not enter a finding that Petitioners had

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[9] *Madsen*, 114 S. Ct. at 2527. In upholding the portion of the 36-foot buffer zone at the clinic entrance and driveway, this Court focused on two factors: (1) an assumption that the protestors had violated a prior non-speech-restrictive injunction which was ineffective in maintaining free ingress and egress; and (2) the narrow confines of the clinic which included a strip of sidewalk approximately four-feet wide and 37-feet long that connected the two parking lots. *Id.* If the first factor was absent, this Court might not have upheld the 36-foot zone at the clinic entrance.

[10] *Id.*

engaged in a "rescue" or had actually "blocked access" to the clinic. Rather, the District Court actually found that:

> Prior to the preliminary injunction hearing, *defendants stipulated that the physical "blockade" type of "rescue" demonstration may be enjoined.* Thus, the evidence adduced at the preliminary injunction hearing centered on the *constructive* "blockade" type of demonstration and "sidewalk counseling." *Commendably, there have been no physical "blockades" since the Court issued the TRO.*[11]

The record clearly reveals that "there have been no physical 'blockades' since the Court issued the TRO." *Id.* As held in ***Madsen***, the interest is to protect access to the clinic. Although Respondents wish to direct this Court to past acts of "blockades" prior to the entry of the TRO or after entry of the preliminary injunction, at the time the preliminary injunction was issued the District Court's findings were clear -- the government interest in protecting access to the clinic was achieved. It is the record before the District Court at the time it entered the speech-restrictive preliminary injunction that is relevant to this Court's inquiry. Because the District Court's record at that time reveals there had been no "blockades" of the clinics, the speech-restrictive injunction was not warranted because access to the clinic was not thwarted.

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[11] *Pro-Choice Network*, 799 F. Supp. at 1424 n.5 (emphasis supplied). Because the ***Madsen*** test was established in 1994, after the District Court entered its ruling in 1992, the District Court did not have the benefit of this Court's guidance regarding analysis of content-neutral injunctions. However, both the Second Circuit panel and en banc decisions, which are the focus of the present controversy, were handed down after this Court decided the ***Madsen*** case and the facts in this case still center upon the record presented to the District Court for the 1992 decision.

The error of the District Court is understandable because it did not have the teaching of ***Madsen*** in 1992. Yet the Second Circuit's en banc decision, looking at the injunction in light of ***Madsen***, should have determined that granting a speech-restrictive injunction without evidence of the need for such a broadly sweeping prohibition on free speech cannot meet the new ***Madsen*** test. As is required by ***Madsen***, a court must first attempt to implement a less restrictive injunction. In this case, the speech-restrictive injunction was granted at the very beginning adding even more fuel to the fire of this controversy. Following the dictates of ***Madsen***, a court is required to attempt a less restrictive (non-speech-restrictive) injunction *before* ever granting the more speech-restrictive provisions -- the 15-foot floating buffer zones and the "cease and desist" provisions.[12] Had the District Court entered a less restrictive injunction, and then found that injunction failed to meet the asserted government interest -- clinic access -- a more restrictive injunction would be warranted.

Respondents wish to assert a "bootstrap" argument by claiming that portions of the original injunction were repeatedly violated following entry of the TRO thereby creating the need for further regulation -- *i.e.* the speech-restrictive injunction. First, Respondents contradict the clear record, because although First Amendment activities continued at or near the subject clinics, access to the clinics was never denied by any "rescue" or "blockade" after entry of the TRO. *See Pro-Choice Network*, 799 F. Supp. at 1424 n.5. Second, Respondents point to various violations of the two provisions challenged herein. Yet, violations of these overbroad and speech impinging provisions are more likely simply because they are so very vague ("floating 15-foot zones") and

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[12] The original TRO contains the provisions challenged herein -- the 15-foot floating buffer zones and the "cease and desist" provision.

overbroad ("cease and desist"). Third. any other acts claimed to have occurred subsequent to the entry of the preliminary injunction should not be considered by this Court because such acts were not considered by the District Court in making the findings supporting the preliminary injunction.

In *Madsen*, this Court upheld a speech-restrictive injunction only after finding that a narrower, non-speech-restrictive injunction failed to protect unfettered ingress to and egress from the clinic. *Id.* at 2527. In this case, there has been no such finding. Neither the Second Circuit en banc nor the District Court decision alleged that the pro-life demonstrators engaged in illegal conduct which was not remedied by the injunction against physical blockades. Nothing demonstrates that a non-speech-restrictive injunction would fail to protect unfettered ingress to and egress from a clinic. The District Court did not even make a determination that a non-speech-restrictive injunction would fail. The court simply announced that it perceived the existence of a problem and proceeded to banish the First Amendment as it applies to pro-life demonstrators.

For these reasons, the 15-foot bubble zone and "cease and desist" provisions violate the *Madsen* test because they substantially burden the Petitioners' right to free speech without establishing the need for such a speech-restrictive injunction and without showing the ineffectiveness of a non-speech-restrictive injunction.

D. The Injunction Burdens More Speech Than Necessary.

Even assuming, *arguendo*, that the District Court correctly followed the *Madsen* test regarding proper procedure when entering the preliminary injunction, under the *Madsen*

test an injunction which burdens more speech than necessary is unconstitutional. *Madsen*, 114 S. Ct. at 2525. In adopting this new standard for content-neutral injunctions, the *Madsen* Court confirmed that this standard was similar to the "precision of regulation" demanded in *Claiborne Hardware*, 458 U.S. at 916, and the *Carroll* standard which requires an injunction be "couched in the narrowest terms that will accomplish the pin-pointed objective." *Carroll*, 393 U.S. at 183. This Court stated the requirement that the speech-restrictive injunction "burden no more speech than necessary to serve a significant government interest" was equivalent to the standard utilized in *Claiborne Hardware* and *Carroll*. *Madsen*, 114 S. Ct. at 2526.

The facts in *Claiborne Hardware* were more egregious than the facts in *Madsen*. In March 1966, several hundred African-Americans implemented a boycott in Claiborne County, Mississippi. This boycott included "acts of physical force and violence" including "[i]ntimidation, threats, social ostracism, vilification, and . . . the stationing of guards in the vicinity of white-owned businesses." *Claiborne Hardware*, 454 U.S. at 894-95. The Mississippi Supreme Court permanently enjoined the boycott but this Court reversed, finding that each element of the boycott was a protected form of speech. *Id.* at 907-08. "Precision of regulation" is demanded when "conduct occurs in the context of constitutionally protected activity." *Id.* at 916. This Court concluded that the injunction "must be dissolved" or "modified to restrain only unlawful conduct and the persons responsible for conduct of that character." *Id.* at 924 n.67.

As in *Claiborne Hardware*, the injunction instituted by the District Court must be dissolved or modified to the extent it regulates lawful conduct. In *Madsen*, this Court held that "injunctive relief should be no more burdensome to the

defendants than necessary to provide complete relief to the plaintiffs." *Madsen*, 114 S. Ct. at 2525 (citing *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979)). "A state may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions." *Cantwell v. Connecticut*, 310 U.S. 900, 905 (1940). This Court laid out the principle for this policy in *New York Times Co. v. Sullivan*, 376 U.S. 254, 720-21 (1963):

> Those who won our independence believed that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risk to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination. . . ."

Government "may not regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals." *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989); *see also City of Houston v. Hill*, 482 U.S. 451, 464-67 (1987) (requiring that regulations on free speech be "narrow and precise").

> An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pin-pointed objective permitted by constitutional mandate and the essential needs of the public order. In this sensitive field, the State may not employ "means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved" . . . . In other words, the order must be tailored as precisely as possible to the exact needs of the case.

Carroll, 393 U.S. at 183-84 (1968) (quoting *Shelton v. Tucker*, 364 U.S. 479, 488 (1960)). A regulation "is not narrowly tailored if a less restrictive alternative is readily available." *Boos*, 485 U.S. at 329; *see also Wygant v. Jacksonville Bd. of Educ.*, 476 U.S. 267, 280 n.6 (1986) (plurality opinion).

Respondents cite *Rowan v. United States Post Office Dep't*, 397 U.S. 728 (1970), as justification for the 15-foot zones and "cease and desist" provision, claiming that unwilling targets have a First Amendment right to be left alone. However, the question is more appropriately phrased: "Do Respondents have a First Amendment right to freely access public fora for their speech while imposing a $10,000 fine and imprisonment upon persons for continuing to talk after Respondents say "shut up"? Like the provision struck down in *Madsen*, any "offensive" or "unwanted" speech could be construed as intimidating, inviting dispute and even stirring people to anger.[13] Thus, anyone could claim intimidation and raise the specter of the injunction granting Respondents a $10,000 windfall per offense.

The injunction creates a narrow exception which allows two individuals to enter the 15-foot zone for the purpose of "sidewalk counseling". Even the right to free speech under the "sidewalk counseling" provision is illusory because under the "cease and desist" provision the clinic has merely to send a pro-choice escort into the area of the pro-life speaker to utter the word, "stop," which silences the pro-lifer person's right to free speech. In effect, the injunction's "cease and desist" provision grants the clinic a government license to silence all speech within traditional public fora. The penalty

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[13] *See Johnson*, 491 U.S. at 408-09; *Terminiello v. Chicago*, 337 U.S. 1, 4 (1949).

for a single violation is "civil damages of $10,000 per day for the first violation . . . and/or may subject them to criminal contempt proceedings . . . ." *Pro-Choice Network*, 799 F. Supp. at 1441. One reason this Court created the new *Madsen* test was because injunctions often carry stiffer penalties for violation of the terms. *Madsen*, 114 S. Ct. at 2524. Additionally, "each successive violation of [the injunction] shall subject the contemnor to a civil contempt fine *double* that of the previous fine and/or civil contempt proceedings . . . ." *Id.* (emphasis supplied). In just seven days, the fine of just one person could rise to over $640,000. Even more interesting is that the injunction awards "that any amount collected thereunder shall be paid to the [clinic] at which the violation occurred." *Id.* Thus, the fines are all payable to the clinic holding the license to silence the speech. Indeed, the clinics could stop performing abortions altogether and simply gather in the fines accumulated from those not withdrawing the required 15-feet in an expeditious manner.

Under the injunction, a person walking within 15-feet of an "unwilling listener" cannot discuss pro-life beliefs with another individual or distribute pro-life literature. In essence, the person must keep silent in order to avoid prosecution. The injunction has created numerous undeterminable and forever moving "no-speech zones" of silence punishable by the wrath of the court if the silence is broken. This general prohibition against free speech within traditional public fora is not narrowly tailored.[14] As such, this Court should not retract from the dictates of *Madsen* by allow speech-restrictive injunctions to be entered without stringently scrutinizing those injunctions which burden First Amendment rights.

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[14] *See Frisby v. Schultz*, 487 U.S. 474, 479 (1988); *Howard Gault Co. v. Texas Rural Legal Aid*, 848 F.2d 544 (5th Cir. 1988); *Town of Barrington v. Blake*, 568 A.2d 1015 (R.I. 1990).

1. The 15-foot floating speech free zones burden substantially more speech than necessary.

The injunction, provision (a), provides complete protection against "blocking, impeding, or obstructing access to, or egress from any [clinic]." *Pro-Choice Network*, 799 F. Supp. at 1440. The injunction will operate to fine and imprison any person actually thwarting anyone's right to an abortion. However, provision (b) of the injunction goes on to create 15-foot bubble zones around the front of doorways, parking lot entrances or any person or vehicle seeking access to an abortion clinic. The 15-foot zones burden more speech than necessary to guarantee the right of access to the clinic and their need to protect access has not been established. An injunction which burdens speech without first establishing the insufficiency of a non-speech-restrictive injunction is unconstitutional. *Madsen*, 114 S. Ct. at 2427.

The 15-foot bubble zones forbid speech even when the speech-related conduct in no way obstructs or impedes access to the abortion clinic. As the Second Circuit panel noted, "the bubble zone provision prohibits a defendant from standing on a sidewalk near the clinic, within 15-feet of anyone seeking ingress to or egress from the clinic, holding a sign imprinted with an anti-abortion message." *Pro-Choice Network of Western New York v. Project Rescue of Western New York*, 67 F.3d 359, 370 (2d Cir. 1994). The provision does allow an exception permitting two people to enter the zone to converse with others. However, as soon as any person, even a clinic escort, objects to the pro-life speaker's message by implementing the "cease and desist" section in provision (c), the speaker must assume complete silence and withdraw at least 15-feet. Thus, like the unconstitutional "no approach" zone in *Madsen*, the injunction still leaves the power of censorship in the hands of the listener.

This Court noted that as "a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech, in order to provide adequate breathing space to the freedom protected by the First Amendment." If this Court's teaching means anything at all, freedom of speech carries a preferred position under the Constitution. *See Kovacs v. Cooper*, 336 U.S. 77, 95 (1949). This "constitutional protection does not turn upon 'the truth, popularity, or social utility of the ideas and beliefs which are offered.'" *New York Times Co.*, 376 U.S. at 721 (quoting *NAACP v. Button*, 371 U.S. 415, 445 (1963)). As discussed, *infra*, by placing control over speech with the listener the District Court abandoned these principles for a new policy designed to silence unpopular views. Provision (a) is fully able to protect the asserted government interest -- access to the clinic. Provision (b) does not serve to protect any interest which is not already protected and therefore is not necessary to serve any government interest. *Johnson*, 491 U.S. at 410, 412 n.8. The court simply failed to justify the need for the 15-foot bubble zone provision. This provision burdens more speech than necessary to protect access to the clinic. *Madsen*, 114 S. Ct. at 2525. Thus, the provision is unconstitutional.

2. The "cease and desist" provision burdens substantially more speech than necessary.

The "cease and desist" provision is unconstitutional because, like the 15-foot bubble zone provision, the need for this speech-restrictive provision was not established. The "cease and desist" provision is indistinguishable from the 300-foot "no approach zone" struck down in *Madsen*. *Madsen*, 114 S. Ct. at 2529. Within 300-feet of the clinic, a pro-life person could not distribute literature or speak with any individual unless a person indicated a desire to communicate. *Id.* This Court held that it would not justify a prohibition on

all uninvited approaches of persons "regardless of how peaceful the contact may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic." *Id.*

This Court struck down the 300-foot "no approach zone" for the same reason it should now strike down the "cease and desist" provision -- any other conclusion will result in the abolishment of the public forum doctrine. The founding fathers "believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth. . . . Believing the power of reason as applied through public discussion, they eschewed silence coerced by law -- the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 374-75 (1929) (Brandeis, J., concurring). Reverence for free speech is nowhere more important than in quintessential public fora which from time immemorial have been open for public debate. It is undisputed that the injunction affects traditional public fora -- specifically the public streets and sidewalks surrounding the clinics. *Frisby*, 487 U.S. at 479; *ISKCON v. Lee*, 112 S. Ct. 2711, 2716-17 (1992) (Kennedy, J., concurring); *Perry Education Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

In an attempt to weave its way around this blatant violation of the well settled public forum doctrine, the court applied the "captive audience" doctrine. *Pro-Choice Network*, 799 F. Supp. at 1435-38. The "captive audience" doctrine stands for the principle that in certain situations a listener has a right not to be exposed to an unwanted message. *See Rowan*, 397 U.S. at 738. The court held that individuals attempting to enter or leave the clinic are a "captive audience" of the pro-lifer speaker. *Pro-Choice Network*, 799 F. Supp. at 1436.

The "captive audience" doctrine does not apply in this situation. In each of the cases cited by the District Court to justify its speech-restrictive injunction, the site where the speech took place was a non-traditional public forum or the speech was projected so broadly (by sound trucks) that it could not be escaped by leaving the public forum. In this case, the speech is taking place in traditional public fora -- including a public sidewalk. *See Perry Educ. Ass'n*, 460 U.S. at 45; *Boos*, 485 U.S. at 318. The "captive audience" doctrine does not apply in traditional public fora. *See Erznoznik v. City of Jacksonville*, 422 U.S. 205, 211 (1975); *Cohen v. California*, 403 U.S. 15, 21 (1971). Any individual seeking ingress to or egress from the clinic, as well as any pro-choice escort working for the clinic, can roam freely without regard to any boundaries and censor pro-life speakers at will merely by approaching and whispering the word "stop."

It is not the clinic entrants who are captive in this case, it is the pro-life speakers who are captive to the whim of individuals who can silence them at will. Like the decretal portion regarding "invited contact" found unconstitutional in *Madsen*, the "cease and desist" provision is not limited to a small geographical area. Rather, the "cease and desist" provision is all around the clinics anywhere a floating 15-foot bubble zone might exist. If the pro-life speaker is simply standing on the sidewalk with a picket sign and a pro-choice escort approaches her and says, "Stop," she must immediately withdraw at least 15-feet. Because the pro-life speaker is now within the escort's 15-foot zone, the escort may quickly and effectively censor her First Amendment rights by merely pursuing her to anywhere she runs. Because the 15-foot zone is always moving, the pro-life person must continue to retreat until the pro-choice escort decides to give up the pursuit. Consequently, this provision truly abolishes the public forum

doctrine because it may extend to any area -- even outside of the area immediately surrounding a clinic. Such a novel "floating no-speech zone" certainly burdens "more speech than necessary" and should be found unconstitutional. *Madsen*, 114 S. Ct. at 2525.

a. The "cease and desist" provision is content-based.

The "cease and desist" provision is much like the provisions struck down in *Madsen* which prohibited "intimidating" persons and limiting speech to a "conversation of a non-threatening nature." *Madsen*, 114 S. Ct. at 2529. In fact, the principle justification used by the District Court in granting the "cease and desist" provision was that persons felt "stressed" and "intimidated" by the pro-life speaker's message. *Madsen* also struck down a provision stating that once invited contact had been initiated, the person associated with the clinic could end the communication by stating such words as "stop," "withdraw," "back off," "get away," "leave me alone," or words or actions of similar import. *Id.* Like this case, in *Madsen*, when the desire to end the contact was made known, the pro-life speaker was required to immediately terminate the contact and leave the presence of the person protected by the injunction. *Id.*

In *Madsen*, the "invited contact" provision hinged on the emotive impact of the listener by using such words as "positive interest" and by providing that the listener affirmatively make the invitation to speak prior to the attempted contact. This Court held:

> [I]t is difficult, indeed, to justify a prohibition on all uninvited approaches of persons seeking the services of the clinic, regardless of how peaceful the contact

> may be, without burdening more speech than necessary to prevent intimidation and to ensure access to the clinic. **Absent evidence that the protestor's speech is independently proscribable (i.e., "fighting words," or "threats"), or is so infused with violence as to be indistinguishable from a threat of physical harm, . . . this provision cannot stand.** "As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous speech, in order to provide adequate breathing space to the freedoms protected by the First Amendment.[15]

Yet, the "burden no more speech than necessary" *Madsen* test is only applicable to content-neutral injunctions. *Id.* If the injunction is content-based, the *Madsen* test does not even apply. *Id.* Yet, even under the content-neutral "burden no more speech then necessary" test, this Court found the consent provisions unconstitutional. In this case, the District Court justified the injunction by finding that the protesters' actions caused stress to individuals entering and leaving the abortion clinic. However, stress is merely the emotive impact or "listener reaction" caused by speech. "The emotive impact of speech on its audience is not a 'secondary effect.'" *Boos*, 485 U.S. at 321. Intellectual and emotive impact of speech is the primary impact of speech. A regulation which regulates speech due to its primary impact is content-based and is subject to the "most exacting scrutiny." *Id.* Because the protesters have not blocked clinic access, the only reason an individual would not want to enter the clinic would be due to the emotive and intellectual impact of the protests. An injunction, where the predominant intent is to regulate the

[15] *Id.* (quoting *Boos*, 485 U.S. at 322) (emphasis supplied) (citations and quotations omitted).

primary effects of speech, is content-based. *Id.* If this Court determines that the "cease and desist" provision is content-based, then the *Madsen* test is inapplicable and the provision is then subject to strict scrutiny. *Id.*

"The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed. Content-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 112 S. Ct. 2538, 2542 (1992). "If there is a bedrock principle underlying the First Amendment, it is that government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991). Clearly the "government may not grant the use of a forum to people whose views it finds acceptable, but deny use to those wishing to express less favorable or more controversial views." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95-96 (1972); *see also Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2141 (1993); *Widmar v. Vincent*, 454 U.S. 263 (1981). Content-based regulations simply cannot be tolerated. *See Forsyth County*, 112 S. Ct. at 2404; *Regan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984). Stressing its disdain for content-based prohibitions, this Court stated that "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open.'" *Mosley*, 408 U.S. at 95-96 (quoting *New York Times Co.*, 376 U.S. at 270).[16]

[16] "Regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Simon & Schuster*, 112 S. Ct. at 508. Content-based regulations of speech constitute "censorship in a most odious form" and

To be content-neutral, the "cease and desist" provision must be "justified without reference to the content of the regulated speech." *Clark v. Community for Creative Nonviolence*, 468 U.S. 288, 293 (1984). In *Coates v. City of Cincinnati*, 402 U.S. 611, 612-14 (1971), this Court struck down an ordinance restricting speech if it was annoying to those passing by. If the First Amendment protects begging, *Loper v. New York City Police Dep't*, 999 F.2d 699 (2d Cir. 1993), critical picketing, *Thornhill v. Alabama*, 310 U.S. 88 (1940), in-person urging of a boycott outside a targeted business, *Claiborne Hardware*, 458 U.S. at 907-08, and verbal "harassment" and "interference" with hunters, *Dorman v. Satti*, 862 F.2d 432 (2d Cir. 1988), it should also protect speech which some persons might find "objectionable". *Madsen*, 114 S. Ct. at 2529.

b. The "cease and desist" provision is viewpoint-based.

Not only is the "cease and desist" provision content-based, it is also viewpoint-based. The provision not only regulates a broad class of speech (abortion speech), but further restricts a subclass of that speech (anti-abortion speech) "based on hostility -- or favoritism -- toward the underlying message expressed." *R.A.V.*, 112 S. Ct. at 2545. The injunction allows speech favoring abortion rights because such would be non-threatening to the person seeking the services of the clinic. Thus, within the category of abortion speech, only speech favoring abortion is permitted while speech opposing abortion is damned.

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clearly violate the first amendment. *Cox v. Louisiana*, 379 U.S. 536, 581 (1965) (Black, J., concurring). "Education is the proper and preferable alternative to censorship." *Whitney*, 274 U.S. at 360.

Like the decretal portion of the *Madsen* injunction, the "cease and desist" provision gives license to one side of the abortion debate while squelching the other. *See Schacht v. United States*, 398 U.S. 58, 63 (1970) (statute "which leaves Americans free to praise the war in Vietnam but can send persons . . . to prison for opposing it, cannot survive in a country which has the First Amendment"); *see also Johnson*, 491 U.S. at 417. The pro-life speaker faces viewpoint censorship because no one on the pro-choice side of the issue is ever subject to the injunction's "cease and desist" provision. Because the "cease and desist" provision leaves control over protected expression with the listener, the "cease and desist" provision creates a "consent zone" which is legally indistinguishable from the "invited contact" zone struck down in *Madsen*. This differential treatment based upon viewpoint should meet with *exacting scrutiny*. *See R.A.V.*, 112 S. Ct. at 2544, 2546; *Simon & Schuster*, 112 S. Ct. at 508; *Boos*, 485 U.S. at 320-22. To satisfy strict scrutiny the injunction must be necessary to serve a compelling state interest and must be narrowly drawn to achieve that end. *See Perry*, 460 U.S. at 45.

The government may not regulate speech "in ways that favor some view-points or ideas at the expense of others." *Members of the City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 787, 804 (1984); *See also City of Cincinnati v. Discovery Network, Inc.*, 113 S. Ct. 1505 (1993). In this case, the injunction is both content *and* viewpoint-based. As such, like the "invited contact" provision in *Madsen*, the "cease and desist" provision should be found unconstitutional because it "burdens more speech than necessary." *Madsen*, 114 S. Ct. at 2525. In the alternative, unlike *Madsen*, this challenged provisions are content and viewpoint-based and must be analyzed under strict scrutiny. The challenged provisions cannot withstand such scrutiny.

II.
AN INJUNCTION RESTRICTING SPEECH IMPOSED IN THE ABSENCE OF A PRIOR UNSUCCESSFUL NON-SPEECH-RESTRICTIVE INJUNCTION IS AN UNCONSTITUTIONAL PRIOR RESTRAINT.

A prior restraint bears a "heavy presumption" against its constitutional validity. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963). The state must meet a "heavy burden" to impose a prior restraint on speech. *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560 (1976); *New York Times Co. v. United States*, 403 U.S. 713 (1963); *Vance v. Universal Amusement Co.*, 445 U.S. 308, 315-16 (1980); *Near v. Minnesota*, 283 U.S. 697, 713 (1931). The presumption against prior restraints is heavier, and the degree of protection broader, than that against limits on expression imposed by criminal statutes. Society "prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 526, 559-60 (1975) (emphasis in original). Indeed, this Court has stated that "the prevention of [prior restraints] was the leading purpose in the adoption of [the first amendment]." *Lovell v. Griffin*, 303 U.S. 444, 451 (1938); *see also Carroll v. President & Comm'rs of Princess Anne*, 393 U.S. 175, 181 (1968) ("Prior restraint upon speech suppresses the precise freedom which the First Amendment sought to protect against abridgement.").[17]

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[17] A prior restraint lends "itself to harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure, [and] results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded within its purview." *Thornhill v. Alabama*, 310 U.S. 88, 97-98 (1940). Such a deterrent "need not affect total suppression in order to create a prior restraint." *Conrad*, 420 U.S. at 556 n.8. Vesting the right to suppress speech to the discretion of the decision maker results in a prior restraint. *See Thornhill*, 310 U.S. at 90. "It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion." *Id.* at 97.

The injunction in *Carroll* was content-neutral but was analyzed as a prior restraint. *Carroll*, 393 U.S. at 181. This Court has traditionally condemned licensing schemes as prior restraints without regard to content restrictions. *Forsyth County v. The Nationalist Movement*, 112 S. Ct. 2395 (1992) (parade permits); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969) (*Shuttlesworth II*) (public demonstration permits). "Although a speech-restricting injunction may not attack content *as content* . . . it lends itself just as readily to the targeted expression of particular ideas." *Madsen*, 114 S. Ct. at 2538 (Scalia, J., dissenting). Justice Scalia rightly pointed out that:

> Our cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the first amendment.". . . . The vice of content-based legislation -- what renders it deserving *of the high standard of strict scrutiny* -- is not that it is *always* used for invidious thought-control purposes, but that it *lends itself* to use for those purposes. And, because of the unavoidable "targeting. . . precisely the same is true of the speech-restricting injunction."[18]

In other words, the vice of a prior restraint, whether in a licensing scheme or an injunction, is not that the restriction *is content-based*, but that it lends itself to those purposes.

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[18] *Madsen*, 114 S. Ct. at 2539 (Scalia, J., dissenting) (quoting *Simon & Schuster v. New York Crime Victims Bd.*, 112 S. Ct. 501, 509 (1991)) (citations omitted) (emphasis in original).

Whether the decision maker is a judge, or an individual with whom discretionary licensing power is vested, makes no difference. The fact that the decision maker is able to make content-based restrictions is enough for a prior restraint. The injunction merely serves as a baton by which the government passes to private individuals the right of prior restraint over picketers in traditional public fora. Such prior restraints are presumptively invalid. *See New York Times Co.*, 403 U.S. at 713; *Bantam Books*, 372 U.S. at 70; *see also* Blasi, *Toward a Theory of Prior Restraint: A Central Linkage*, 66 MINN. L. REV. 11 (1981).

Provision (a) adequately protects the clinic and the public without infringing on free expression. Both the 15-foot bubble zone and "cease and desist" provisions violate the First Amendment and this Court should find them unconstitutional.

CONCLUSION

In light of the above, this Court should reverse the judgment of the Second Circuit Court of Appeals.

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